IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S BENCH BRIEF REGARDING THE PERMISSIBLE SCOPE OF AN EXPERT WITNESS'S TRIAL TESTIMONY VIS-À-VIS THE EXPERT'S WRITTEN REPORT

Plaintiff, the State of Oklahoma ("the State"), hereby submits this bench brief to assist the Court with its evidentiary rulings involving the permissible scope of an expert witness's trial testimony vis-à-vis the expert's written report.

Discussion

Federal Rule of Civil Procedure 26(a)(2)(A) provides that "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2)(A). Rule 26(a)(2)(B), in turn, generally requires that this disclosure be accompanied by a written report containing:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case

Fed. R. Civ. P. 26(a)(2)(B).

The purpose of Rule 26(a)(2) is "'to eliminate surprise and provide the opposing party with enough information regarding the expert's opinions and methodology to prepare efficiently for deposition, any pretrial motions and trial.'" *Sierra Club & Mineral Policy Center v. El Paso Props., Inc.*, No. 01-cv-2163, 2007 WL 1630710, at *5 (D. Colo. June 4, 2007) (quoting *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1122 (D. Colo. 2006)); *Muldrow v. R-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007) (same).

Thus, in determining whether a trial court has improperly admitted expert testimony beyond the scope of the expert's report, the Tenth Circuit evaluates the extent to which such testimony caused the opposing party prejudice or surprise. *See, e.g.*, *Nalder v. West Park Hosp.*, 254 F.3d 1168, 1178 (10th Cir. 2001) ("[P]laintiffs argue that Dr. Baergen's testimony regarding the timing of NRBCs should not have been admitted because it was not disclosed in her pretrial expert witness designation. . . . After careful review of the record, *we conclude that plaintiffs have failed to demonstrate significant surprise or prejudice*." (emphasis added)); *see also Means v. Letcher*, 51 Fed. App'x 281, 284 (10th Cir. 2002) (affirming decision granting new trial because expert's testimony that defendant's diagnosis and treatment was inappropriate caused significant surprise and prejudice given absence of standard of care opinion in written report); *Goeken v. Wal-Mart Stores, Inc.*, No. 99-4191, 2002 WL 1334863, at *2 (D. Kan. May 23, 2002) (concluding that no harm had resulted from plaintiff's failure to supplement discovery where

omitted subject matter arose at two depositions, thereby curing any prejudice or surprise that might have otherwise resulted from lack of supplementation).

Significantly, Rule 26(a)(2)(B) "'does not limit an expert's testimony simply to reading his report. . . . ***The rule contemplates that the expert will supplement, elaborate upon***, [***and***] ***explain*** . . . ***his report' in his oral testimony***." *Muldrow*, 493 F.3d at 167 (emphasis added) (quoting *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006)); *accord EEOC v. Freemen*, 626 F. Supp. 2d 811, 823 (M.D. Tenn. 2009); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, No. 04 Civ. 3417, 2009 U.S. Dist. LEXIS 62649, at *25 (S.D.N.Y. July 20, 2009); *City of Owensboro v. Ky. Utils. Co.*, No. 4:04-CV-87, 2008 U.S. Dist. LEXIS 81945, at *12 (W.D. Ky. Oct. 14, 2008); *cf. McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 652 (D. Kan. 2003) (Rule 26 "does not require that a report recite each minute fact or piece of scientific information that might be elicited on direct examination").

Relatedly, expert testimony may be admitted where the opinions set forth in the expert report are either supplemented and/or expanded upon at deposition. *See, e.g., In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 646, 659-60 (N.D. Ill. 2006); *Hess v. Ameristep*, No. 06-3267, 2008 WL 4936726, at *3 (C.D. Ill. Nov. 17, 2008) ("Ordinarily, the lack of a supplemental report would not violate Rule 26(a) or 26(e) because [plaintiff's expert's] supplemental opinions were made known to the Defendant through [plaintiff's] second deposition." (citing Fed. R. Civ. P. 26(e)(1)(A))); *cf. Flowers v. Striplin*, No. 01-1765, 2003 WL 25683914, at *1 (E.D. La. May 22, 2003) (the court "will not permit any expert witness to state any opinion or testify about any matter that was not either contained in a Rule 26(a)(2) report *or elicited at the witness' deposition*" (emphasis added)). In *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. at 659-60, the district court noted that responsive testimony to deposition questions "is not the kind of ambush

with an undisclosed opinion that the disclosure rules were designed to prevent." The court further quoted one commentator, who cautioned:

> If you decide to take an expert deposition, you must be careful what you ask. You may open the door to testimony that would otherwise be precluded under Rule 37(c)(1). . . .

Id. at 660 (quoting Joseph, Gregory P., *Expert Approaches*, 28 Litigation 20, 21 (Summer 2002). "Indeed, the very fact that the defendants elicited such testimony at the deposition has been found . . . to amount to all the disclosure necessary under Rules 26(a)(2) and 37(c)(1)." *In re Sulfuric Acid*, 235 F.R.D. at 660 (citing *Wheeler v. Chrysler Corp.*, No. 98 C 3875, 2000 WL 263887, at *6 (N.D. Ill. Mar. 1, 2000) (defendant deposed expert at length about his causation opinion and was, therefore, not prejudiced by lack of disclosure of that opinion in expert's report)). *See also Brawhaw v. Mariner Health Care, Inc.*, No. 2:04cv322, 2008 WL 2004707, at *4 (N.D. Miss. May 8, 2008); *Mason v. Brigham Young Univ.*, No. 2:06-cv-826 TS, 2008 WL 444538, at *1 (D. Utah Feb. 14, 2008) ("although Dr. Komar was not timely designated as an expert, the Court finds that there is no prejudice to Mason in allowing Dr. Komar to testify regarding matters contained in his Report and deposition").

Indeed, the "the permissible scope of expert testimony is quite broad, and District Courts are vested with broad discretion in making admissibility determinations." *Hill v. Reederei F. Saeisz GmbH*, 435 F.3d 404, 423 (3d Cir. 2006). There is no "bright line rule that every opinion by an expert must be preliminarily stated in the report, or forever be precluded." *See id.* (internal quotation marks omitted). Therefore, "[a]n expert may testify beyond the scope of his report absent surprise or bad faith." *Bowersfield v. Suzuki Motor Corp.*, 151 F. Supp. 2d 625, 631 (E.D. Pa. 2001). This is especially true when the expert provides rebuttal testimony. *See, e.g., Mead Johnson & Co. v. Barr Labs.*, 38 F. Supp. 2d 289, 297 (S.D.N.Y. 1999) ("[defendant] properly

elicited testimony . . . in rebuttal to the assertions of plaintiff's counsel, which [defendant] did not anticipate at the time of its expert's report and deposition").

Similarly, the Eighth Circuit Court of Appeals has suggested that a trial court can cure any prejudice that might result from expert opinions that exceed the scope of those disclosed prior to trial by instructing the trier of fact "to take this discrepancy into consideration when weighing [the expert's] testimony and credibility." *Shuck v. CNH America, LLC*, 498 F.3d 868, 876 (8th Cir. 2007); *see also In re Prempro Prods. Liability Lit.*, 514 F.3d 825, 831-32 (8th Cir. 2008) ("This testimony went beyond Dr. Rarick's report, but was elicited in response to an opinion of Rush's expert . . . and opinion which also had not previously been disclosed. . . . ***Rush was not prejudiced and the district court did not abuse its discretion in allowing this testimony***." (emphasis added)). In this bench trial, the Court is fully capable of evaluating whether an instance of supplementation of, elaboration upon, or explanation of the contents of an expert's written report in his or her oral testimony is a true discrepancy from the report that impairs the credibility of the expert.

In fact, it might simply be the case that, although not expressly articulated therein, an expert's seemingly new opinion is sufficiently consistent with and within the scope of his report. In *Law v. NCAA*, 185 F.R.D. 324 (D. Kan. 1999), for example, the court noted that the expert's opinion "that the NCAA's antitrust conspiracy 'touched' or 'nicked' any coach who worked as a restricted earnings coach ['REC'] between 1992 and 1997" was not actually inconsistent with his reports and pre-trial testimony. *Id*. at 328-29. In support, the court quoted a series of statements that inferentially — but not explicitly — supported that proposition. Specifically, the court said:

> Dr. Tollison stated in his reports, declarations and testimony at the *Daubert* hearing that the NCAA had engaged in the exercise of monopsony power, singled out the class of RECs in order to extract salary concessions, and levied its superior bargaining

> power against them. *See, e.g.*, Declaration of Robert D. Tollison (January 19, 1998), ¶ 8 ("economic theory and common sense suggest that plaintiff coaches were in a radically different bargaining environment after the imposition of the restrictions so that there is every reason to predict that RECs earning less than $12,000 were impacted by these restrictions"); ¶ 9 ("it is entirely possible that coaches [hired] after May 25, 1995, and who were paid more than $12,000 were injured by the REC compensation limitations"); Declaration of Robert D. Tollison (April 3, 1997), ¶ 9 ("[t]he effect of this enhanced bargaining power was levied against all RECs in their individual negotiations with their schools") (emphasis in original), ¶ 10 ("[a]ll REC wages were subject to a new bargaining environment in which bargaining power had shifted significantly to schools"), and ¶ 14 ("[i]n this world all coaches arguably suffered damages as a result of the rule. And if they did not suffer damages, my model will not find damages.").

Id. at 328-29; *see also Hynes v. Energy West, Inc.*, 211 F.3d 1193, 1203 (10th Cir. 2000) (rejecting argument that oxidization theory was not addressed in expert report given that report referred to "the fact that an oxidization reaction may play a role").

In summary, the State does not suggest that trial experts should be allowed to offer new opinions that unfairly surprise the opposing side at trial. However, absent genuine unfair surprise, the State believes the expert report should not be so confining that an expert cannot "***supplement***, ***elaborate upon***, [***and***] ***explain*** . . . ***his report in his oral testimony***" in pursuit of the truth in this matter. *Muldrow*, 493 F.3d at 167 (emphasis added).

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